IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT

JOHDPUR

JUDGMENT

LRs of Late Shri Mangilal Agarwal **VS.** Assistant Commissioner
of Income Tax,
Jodhpur.

D.B. INCOME TAX APPEAL NO.09/2001
against the order of the Income Tax Appellate Tribunal for Assessment Year 1988-89 in ITA No.456/JP/1994 dated 24.3.99.

Date judgment : 18th October, 2006

PRESENT

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. Anjay Kothari for the appellant.

Mr. Sangeet Lodha) for the respondent.
Mr. Vivek Shrimali)

BY THE COURT: (PER HON'BLE RAJESH BALIA, J.)

In this appeal the following questions were framed as substantial questions of law arising for consideration in this appeal:-

(i) Whether in the facts and circumstances of the case, when the gold in question was recovered by the authority under the Gold Control Act during search conducted on 14th October, 1987 and subjected to proceeding under the Gold Control Act much before search u/s.132 of I.T. Act took place on 17.11.88 on the premises and the gold in question was not recovered from the possession of inmate of the premises under search u/s.132 of the I.T. Act, the presumption u/s.69 of the Income Tax Act, 1961 could at all be raised about the ownership to their property in question and if raised stands rebutted by the decision of CEGAT?

(ii) Whether in the facts and circumstances of this case, when gold in question was found much prior to search conducted on 17.11.88 and had been subjected to proceeding under the Gold Control Act under which the gold has been found and finding has been reached about the ownership of said Gold by the CEGAT in those proceedings is binding on the proceedings u/s.132 in respect of the properties which have been found and subjected to proceeding under the Gold Control Act independently".

The facts emerging from the material placed before us and relevant for the present purposes are that in a search conducted at the premises of the Mangi Lal Agarwal, the assessee since deceased and represented by his heirs and legal representatives, by the customs authorities, 11 pieces of primary gold weighing 765.150 and 53.00 grams of gold ornaments were recovered from his house and the same were seized by the Customs Authorities. The proceedings for confiscating the primary gold were pursued. However, the adjudicating authority did not find that the assessee was in possession of gold ornaments in breach of provisions of Gold Control Act or the Customs Act and the same were released.

Adjudicating authority under the Gold Control Act did not accept the assessee's explanation that the primary gold weighing 765.150 grams did not belong to him except 6.800 grams which were small articles used for Pooja. The assessee has claimed that he has received primary gold from 3 different goldsmiths to

whom the ornaments were brought by Shri Bhopal Singh, Om Prakash Gupta and Shri Gauri Shanker Singhal respectively for the purpose of making new ornaments and since making of new ornaments required dye cutting of the primary gold which came into existence by melting gold ornaments for the purpose of making new ornaments, were delivered to the assessee for getting the primary gold dye cut through some registered goldsmiths having the facility of dye cut.

Adjudicating Authority having not accepted the aforesaid explanation furnished by the assessee ordered confiscation of the primary gold and also levied penalty with an option to redeem the same on payment of the redemption fee.

On appeal before the CEGAT as was then existing of the Judicial Member and Technical Member differed. The opinion of Technical Member was for affirmation of the order of adjudicating authority and Judicial Member reached different conclusion on considering the material before him and recorded his

conclusions as under:-

> "It is on record that the owner of the primary gold filed their affidavit before the Adjudicating Authority. Copies of the statutory record of the certified Goldsmiths concerned were also filed, but the Adjudicating Authority discarded them mainly taking into consideration the human conduct, but forgetting the aforesaid vital and material evidence on the record. Under these circumstances, I hold that the primary gold except the three pieces weighing totally 6900 grammes belonged to the said owner. In fact, this fact is also borne out by the record of the case. In his impugned order, while ordering for the confiscation of the primary gold with an option to redeem the same on payment of a redemption fine, the Adjudicating Authority also ordered that on redemption the primary gold shall be converted into ornaments by licensed gold dealers. Accordingly, the appellants redeemed the same and returned the same to the respective owners after getting it converted into ornaments by a licensed gold dealer and informed the Adjudicating Authority accordingly. The relevant

communication is on our record."

There being difference of opinion, the matter was referred to the third Member, who after considering the state of affairs of the evidence agreed with the finding reached by the learned Judicial Member and appeal was allowed. The gold was released from confiscation under Gold Control Act.

From the aforesaid, it is apparent that so far as the fact that assessee was found in possession of 765.150 grams of primary gold and 53.00 grams gold ornaments on 14.10.1987 relevant to assessment year 1988-89 and in respect of gold ornaments, no breach of provisions of Gold Control Act was found on the part of the assessee by the Customs Authorities and in respect of primary gold except 6.900 grams, it was categorically found at the end of the proceedings that it was owned by other persons and not by the assessee.

This fact assumes significance in the context of controversy raised in this appeal arising under Income

Tax Act and its effect on the conclusion reached by the Assessing Officer and other authorities.

Section 71 of the Gold Control Act under which any Gold found in contravention of the provisions of the Gold Control Act is to be confiscated reads as under:-

S.71. Confiscation of gold.

(1) Any gold in respect of which any provision of this Act or any rule or order made thereunder has been, or is being, or is attempted to be, contravened, together with any package, covering or receptacle in which such gold is found, shall be liable to confiscation:

Provided that where it is established to the satisfaction of the officer adjudging the confiscation that such gold or other thing belongs to a person other than the person who has, by any act or omission, rendered it liable to confiscation, and such act or omission was without the knowledge or connivance of the person to whom it belongs,

it shall not be ordered to be confiscated but such other action, as is authorised by this Act, may be taken against the person who has, by such act or omission, rendered it liable to confiscation.

(2) Where any package, covering or receptacle referred to in sub-section (1) contains any other goods, such contents shall also be liable to confiscation.

(3) Where any gold is liable to confiscation under sub-section (1), it shall be so liable notwithstanding any change in its form, and where such gold is mixed with other goods in such manner that it cannot be separated from those other goods, the whole of such goods, including the gold, shall be liable to be confiscation.

(4) On and from the commencement of Gold (Control) Amendment Act, 1971 (21 of 1971), the proviso to sub-section (1) shall also apply to any gold or other thing which is liable to confiscation under sub-section (2) or sub-section (3).”

From the aforesaid provisions, it is apparent

that where a person is found in possession of any gold in breach of any provision of the Act or Rule or order made thereunder such gold together with any package, covering or receptacle in which such gold is found, shall be liable to be confiscated. The only defence against the confiscation of such gold in the hands of the person in whose possession the gold is found is that it is established to satisfaction of the officer adjudging the confiscation that such gold or other thing belongs to a person other than the person from whom it has been seized. Therefore, the avoidance of confiscation cannot be merely on the basis of technical ground but has to be on substantive finding on the basis of material on record that it belongs to person or persons other than the persons in whose possession it was found and seized. Avoidance of confiscation does not depend on merely satisfaction that it is not proved or that it cannot be said that the seized gold belongs to the person in whose possession it was found. The finding is required to be made in a positive manner on substantive aspect of the ownership vesting in third person.

Coming to the proceedings under Income Tax Act, the Assessing Officer while assessing the total income of the assessee for the assessment year 1988-89 during which the assessee was found in possession of the aforesaid primary gold and gold ornaments by the Customs Authority resorted to Section 69A (wrongly mentioned as 69) for calling upon the assessee's explanation about the nature and sources of acquisition of such primary gold and ornaments. The assessee relied on some explanation and the material which was placed before the authorities under Customs and Gold Control Act namely that he has received the gold ornaments from three persons namely Shri Bhopal Singh, Om Prakash Gupta and Shri Gauri Shanker Singhal. For the purpose of making new ornaments which were delivered to three different Goldsmiths and as a result of conversion of the said ornaments into primary gold as part of process of making new ornaments such primary gold was delivered by these three persons in different quantities to the assessee for getting the same dye cut through a registered goldsmith having dye cutting facility and residing near his house. About gold

ornaments weighing 41.200 grams recovered from him it was stated that they belonged to Bhopal Singh. In support of his explanation he primarily relied on the proceedings before the Custom Authorities and the affidavits and the applications filed before the Customs Authorities. The assessee's explanation was that three aforesaid persons have brought gold ornaments to him for making new ornaments which was delivered to different Goldsmiths through him, who had made it clear that for the purpose of remaking the ornaments of the description required by the person bringing ornaments will need dye cutting and after melting the ornaments the recovered primary gold would be sent to the assessee for the purpose of taking it dye cutting to registered goldsmith having such facilities. The Assessing Officer after finding certain discrepancies about source of acquiring gold ornaments by them in the affidavits of each of the aforesaid three persons from whom such gold was stated to have been received and other persons in the light of the statements given by the said three persons recorded separate finding in case of each persons.

About Bhopal Singh to whom the assessee attributed 412.200 grams of primary gold and 53.500 grams of gold ornaments the finding recorded by the Assessing Officer is as under:-

> "On the basis of above it is clear that the claim of Sh. Bhopalsingh with regard to the gold ornaments/gold weighing 412.200 gms. and gold ornaments weighing 53.500 gms. is not genuine."

264.400 grams of primary gold was attributed to the outcome of the gold ornaments bought from Om Prakash Gupta and 81.75 grams were attributed to out come of the ornaments brought by Shri Gauri Shanker Singhal. Apparently, the assessee has attributed ownership to all the three persons.

The finding recorded by the Assessing Officer in respect of Om Prakash is as under:-

> "On the basis of above, it is clear that the

> claim of Sh. Om Prakash Gupta regarding ownership of the gold ornaments weighing 264.400 gms. is not benign."

The finding recorded by the Assessing Officer in respect of Shri Gauri Shanker Singhal is as under:-

> "On the basis of above, it is clear that ornaments were not belonging to Sh. Gauri Shanker as claimed by the assessee."

On the anvil of these findings and by referring to the reasoning which weighed with the adjudicating authority under the Customs and Gold Control Act which has been set aside by the majority opinion of the CEGAT the assessee's explanation was rejected and the value of the primary gold and gold ornaments were added in the income of the assessee for the assessment year 1988-89.

On appeal, the CIT (Appeals) vide his order dated 7.2.1994 affirmed the finding of the ITO and those findings were affirmed by the Tribunal also.

In the aforesaid circumstances, the aforesaid appeal has been preferred by the assessee.

It will be apposite to reproduce Section 69A at this stage:-

> "69A. Where in any financial year the assessee is found to be the owner of any bullion, jewellery or valuable articles is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year."

The primary condition of invoking Section 69A for the purpose of making additions of the value of jewelery, bullion, or valuable article or other valuable

article or money **'of which the assessee is found to be the owner of any of these articles'** and not recorded in the books of accounts, as income from undisclosed sources. Apparently the condition precedent for invoking Section 69A is the finding that the assessee is found to be the owner of any bullion, jewellery or other valuable articles. No presumption of ownership has been raised statutorily in favour of revenue and against the assessee, nor there is any warrant to invoke Sec.69A merely on the basis of assessee's possession. On his disclaimer that such articles found in his possession do not belong to him, the burden lies on the Revenue to establish the ownership of the assessee before raising any presumption against him.

So far as the finding that the money and valuable articles are owned by the assessee is concerned, the burden is squarely on the Revenue because it is only on reaching such finding the opinion that can be given about the source of its acquisition. It is only on establishment of ownership of such articles either on admission of the assessee or otherwise if

assessee fails to explain satisfactorily the source of acquisition of such valuables that Section 69A can be invoked for making additions into the total income of the assessee value of such articles as income from undisclosed sources for the assessment year relevant to previous year during which the assessee is found to be owner of such valuable articles. Therefore, the burden of proving ownership of the assessee in valuable found in possession of the assessee rests on the Revenue and not with the assessee. What amount of evidence to establish ownership would depend on facts and circumstances of each case. In the present case, the Assessing Officer has started with the presumption of ownership merely on the basis that the assessee was found in possession of the aforesaid primary gold and gold ornaments by Customs Authority apprehending the possession of the assessee in breach of provisions of Gold Control Act. However, with clear finding reached by the CEGAT, which was though not binding but was relevant material to go into consideration, the assessee has displaced the presumption about ownership arising from mere possession of the primary gold and gold

ornaments on 14.10.1987. Therefore, the ultimate burden rested with the assessing officer to reach a finding about the ownership of such valuables vesting in the assessee with some material having nexus with the finding of such ownership. We have noticed above that the finding reached in respect of all the three persons from whom the assessee claimed to have received the aforesaid valuables and on the basis of receipt he was claiming to be the owners the only finding reached by the Assessing Officer is that the said three persons have failed to prove their ownership because their explanation about source of acquisition of such gold ornaments by them was found to be suspect. The fact that Shri Bhopal Singh, Om Prakash Gupta and Shri Gauri Shanker Singhal have failed to prove their ownership of the gold or there was some discrepancies in the explanation furnished by them cannot lead to any inference that because the persons who claimed to have delivered or claims to be the owner of the gold in question have failed to explain the source of their acquisition that the assessee can be presumed to be the owner of such primary gold and gold ornaments, to displace the finding reached by the CEGAT

that the gold ornaments and primary gold did belong to the three persons from whom he alleged to have received and do not belongs to the assessee.

The logic that because the gold ornaments are not proved by three persons as belonging to them though it was admitted by each one of them that the attributed gold ornaments and primary gold derived from such ornaments belong to them respectively it belongs to the assessee suffers from legal lacuna. The finding cannot be considered to be a finding of fact which binds the Appellate Court. The findings of Tax Authority stand vitiated not only by a wrong view of burden in appreciating the evidence but having no nexus between the finding about the failure of Serve Shree Bhopal Singh, Om Prakash Gupta and Shri Gauri Shanker Singhal to prove the ownership of the gold ornaments which they admit to have delivered to the respective goldsmiths through the assessee Mangilal Agarwal for the purpose of making new ornaments as a piece of evidence to establish the ownership of the assessee. It is this failure on the part of the assessing officer and

subsequently affirmation of that finding without considering the vital aspect of the applicability of Section 69A, it remains a finding with no material on the basis of which any finding could be reached that the assessee was owner of the primary gold and the gold ornaments found in his possession by the Customs Authority, which the assessee claimed to have received in the manner stated above namely from Shri Bhopal Singh, Om Prakash Gupta and Shri Gauri Shanker Singhal who brought the gold ornaments and delivered to him for the purpose of making new ornaments and the primary gold found in possession of assessee was released from confiscation only on a clear finding that such primary gold belong to the above named three persons. The said persons had admitted their ownership in Income Tax proceedings also. The three persons existence is not in doubt. Their affidavits have been brought on record. The fact that because the ornaments were brought by these three persons, the assessee has described them as owners of the gold cannot be held against the assessee to hold him to prove the ownership. If these persons had not stated correctly about the ownership of the gold

ornaments brought to assessee by them it cannot be evidence of the ownership of the assessee over the primary gold and gold ornaments found in his possession on 4.10.1987 brought by said three persons to the assessee. There is nothing to rebut the statements of said three persons brought different weight to gold ornaments to the assessee for remaking the new ornaments. Thus, the finding recorded by the Income Tax Authorities remains a finding on a wrong view of the burden of proof, by erroneous reading of the requirement of Section 69A for the purpose of making additions of the value of the primary gold and gold ornaments in the hands of assessee in whose possession the same were found and by recording finding about the ownership of the assessee without any material but merely presuming him to be owner because Shri Bhopal Singh, Om Prakash Gupta and Shri Gauri Shanker Singhal have failed to prove their ownership notwithstanding they are admitting that they brought the said gold to the assessee for making new ornaments, against which statement there is no evidence. Such persons claim ownership of such ornaments also.

It may also be noticed here that Section 69A cannot be invoked merely on the basis that a person is found in possession of any valuable article but it is only on his being further found to be the owner of such money, bullion, jewellery or other valuable articles that Sec.69A can be invoked for raising presumption. This basic link is missing through the proceedings resulting the Tribunal affirming the order of the CIT (Appeals) and the Assessing Officer cannot be sustained.

In this connection, the reference may be made to Section 68 of the Income Tax Act, 1961 which is couched in relation to credit entries found in the books of assessee in the relevant previous year. It ordains that where the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.

Considering these provisions, the High Courts have explained that the assessee cannot be presumed to have special knowledge about the source of source or origin of origin. Once the assessee points out a depositor from whom he has received money and if the depositor owns the advancement of money to the assessee, the further enquiry into the source of source or failure to explain source of source cannot result in invoking provisions of Section 68 unless the existence of person in whose name the credit entry is found is not proved or he disowns to have made such deposit or advancement. But once the named creditor is proved to exist exert and he owns to have lent money to the assessee, the same cannot be considered as income of the assessee unless revenue establishes by some evidence that it was really flowing directly from the assessee himself.

Reference in this connection may be made to the decision of the Supreme Court in Commissioner of Income-Tax (Central), Calcutta V. Daulat Ram Rawatmull 87 ITR 349 which arose in similar circumstances. It was

a case in which a sum of Rs.5 lacs standing in the name of B was sought to be assessed in the hands of assessee firm as belonging to it. The Assessing Officer has found that said Rs.5 lacs stood deposited in the name of B, did not belong to B and found that it is belonging to the assessee firm and assessed as income from undisclosed sources of the assessee. However, the CIT (Appeals) had set aside the said additions and utpo the Tribunal, the finding was affirmed. On a reference being submitted to the High Court in terms of directions issued under Section 66(2) of the Indian Income Tax Act, 1992, the High Court set aside the additions made on account of undisclosed income in relation to said amount. On appeal, affirming the judgment of the High Court, the Supreme Court said:-

> "That the question was not whether the amount of Rs.5 lacs belonged to B, but whether it belonged to the respondent-firm. The fact that B had not been able to give a satisfactory explanation regarding the source of Rs.5 lakhs would not be decisive even of the matter as to whether B was or was not the owner of that amount. A person could still

> be held to be the owner of a sum of money even though the explanation furnished by him regarding the source of that money was found to be not correct. From the simple fact that the explanation regarding the source of money furnished by X, in whose name the money was lying in deposit, had been found to be false, it would be a remote and far-fetched conclusion to hold that the money belonged to Y. There would be in such a case no direct nexus between the facts found and the conclusions drawn therefrom."

To wit in the present case the real question before the authority below was whether the primary gold and the gold ornaments found in possession of the assessee on 14.10.1987 were owned by the assessee. The assessee has explained the transactions through which the primary gold and the gold ornaments came in his possession when the search of the customs took place at his residence and the same were seized. In support of said explanation, he has produced said three persons, who had brought the ornaments to him and have furnished their affidavits admitting such fact.

We have noticed above that the finding in each case has been recorded about those persons who had delivered the ornaments to the assessee that they have failed to prove their ownership to the ornaments and on that basis, the Assessing Authority has jumped to the conclusion that the said ornaments were belonging to the assessee and those findings have been affirmed by the CIT (Appeals) and the Tribunal.

By the parity of reasonings which prevailed in Daulat Ram Rawatmull's case (supra) it can well be said that merely because the explanation furnished by Shri Bhopal Singh, Om Prakash Gupta and Shri Gauri Shanker Singhal about the purpose for which the gold ornaments were delivered for making new ornaments were the ornaments belonging to their family was found to be not acceptable could not have provided any nexus between the facts and conclusion reached by drawing inference therefrom that the primary gold and gold ornaments belonged to the assessee.

As a result in view of the aforesaid

discussion, this appeal must succeed. Accordingly, this appeal is allowed. The orders of Tribunal, CIT (Appeals) and Assessing Officer are set aside to the extent additions have been made of the value of primary gold and gold ornaments in question as income from the undisclosed sources in computing taxable income for the assessment year in question.

No order as to costs.

[GOPAL KRISHAN VYAS], J. [RAJESH BALIA], J.

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